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October 23, 2007

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

**Re: MB Docket No. 07-57**

Dear Ms. Dortch:

On October 18, 2007, an ex parte meeting was held with Commissioner McDowell and Cristina Chou Pauze, the Commissioner's Legal Advisor, Media Issues, concerning issues on the Consolidated Application of XM Satellite Radio Holdings, Inc. (XM) and Sirius Satellite Radio, Inc. (Sirius) (collectively, the "Applicants") for approval to transfer control of licenses and to merge the two companies into a single satellite radio network, Media Bureau Docket No. 07-57.

The meeting was attended by Mr. Andrew Lowinger, President and CEO of U.S. Electronics, Inc., New York, New York (USE), and the undersigned, Senior Partner, Helein & Marashlian, LLC, McLean, Virginia, communications counsel to USE.

In the meeting, Mr. Lowinger provided additional information on the issues USE raised in its Comments filed in the Docket on August 10, its Reply Comments filed August 24, 2007 and its Petition to Defer Action filed October 12, 2007. Mr. Lowinger emphasized that the information he provided is based on his and his company's first hand experience over the past three years with the Applicants' sole sourcing practices as duopolists and on his 20 years experience in the design, development, and distribution of network communications devices and the manufacturing process that produces such devices and overall, 35 years in retailing in general with primary focus on a variety of consumer electronic products.

Mr. Lowinger advised that USE's concerns are not specifically over the merger's impact on the horizontal market of satellite radio, but on the adverse impact on the vertical or downstream market and how that impact is likely to expand after merger.

The key points presented included the need for conditioning the merger to prevent the merged entity from unduly influencing and ultimately controlling the downstream markets of manufacturing and distribution of satellite radio receivers and accessories. Emphasis was placed on how both consumers and competition will be adversely affected by the merged entity's ability, if left unchecked, to use its monopoly power in both the horizontal and vertical satellite radio market to burden consumers with higher prices, lower quality, and less innovation.

Consumers could also be disadvantaged by other inherent characteristics of monopoly providers. Without competition, it is likely that only the most cost-efficient method of production and distribution will be employed. That is, the sole determinant for what products to provide will be to find the lowest cost alternatives in order to maximize profit margins. Should product developments lead to some lowering of production costs that are at least equal in quality to that of marginally acceptable products already in the field, those costs savings are not passed on to consumers. Instead, those cost savings will be retained to increase profits or to seek and develop additional profit centers. Services and products become static, customer satisfaction minimal to non-existent. These conditions are followed by demands for government intervention to impose regulation to correct the discontent. All of these consequences are not only possible but probable in an unregulated, unconditioned monopoly environment.

In addition to the adverse impacts on consumers in terms of price, quality, availability, features and functions resulting from a non-competitive market, consumers can also be misled about the true costs they are paying. Subscription rates, while quite visible to the consumer (the "front door" of the purchase decision), can be kept low while the prices for the equipment needed to obtain the service can be disguised and manipulated in ways that will be invisible to consumers (the "back door" of the purchase decision). In the end the reality becomes one of hidden subsidies that distort the true costs of satellite radio services.

Based on USE's overall experience in the consumer electronics field, its specific experiences with the downstream markets for satellite radio receivers, and its observations of the present effects of the Applicants' moves to sole sourcing, USE also expressed concerns that the merger if not properly conditioned could adversely impact both the retail and automotive market segments for satellite radio. In the retail market segment, the consequences on the small, independent retailers (the "mom and pops") could be particularly severe, ultimately driving them from the satellite radio market entirely. In retail, dominant suppliers can leverage their control of their offerings by exacting marketing and sales concessions that squeeze the retailers' profits forcing their prices to consumers to increase making them less competitive and even non-competitive. The small, mom and pop retailers are particularly vulnerable to these tactics because, unlike with other audio entertainment devices, they will have nowhere else to obtain competing satellite radio products than from the merged entity that chooses not to deal or to deal only by forcing acceptance of onerous terms and conditions.

In the automotive marketplace, without competition, the sole sourced supply of satellite radios for in-car options, means that there will be no alternative sources of supply to discipline pricing. Prices can be set solely in regard to the demand of auto buyers for the unique and singular network services offered solely by the merged entity.

To protect against these dangers, USE asked that the merger be conditioned as it requested in its Petition to Defer Action, that is, that the merged entity should:

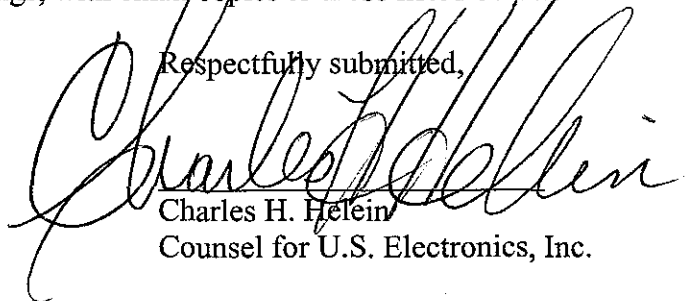
- Be barred from directly or indirectly engaging in or interfering with the design, manufacture or distribution of satellite radio receivers or other digital devices that can access the satellite radio network;
- Publish and make available information on the technical requirements and specifications of its network, including reasonably advanced notice of any changes to any qualified and willing partner;
- Not interfere with consumers' access to, or their choice of, devices by which to access the network;
- Comply with rules and regulations that provide for the compatibility of receivers to ensure that the satellite radio-using public has reasonable and non-discriminatory access to the satellite radio network;
- Comply with the FCC's policy that the public has the right to use any device to access and make use of the satellite radio network, consistent with the principles established in the *Hush-a-Phone* and *Carterfone* decisions -- as codified in Part 68 of the FCC's Rules, 47 C.F.R. Part 68; as well as the principles established under Section 629 of the Telecommunications Act of 1996, the FCC's implementing rules of Section 629, 76 C.F.R. §1200 et seq., and the Court's affirmation of the FCC's implementing regulations in *Charter Communications Company v. FCC*, 460 F.3d 31 (D.C. Cir. 2006); and importantly,
- Be subject to an independent monitor who will ensure compliance with FCC rules and regulations.

During the meeting reference was also made to the open access policies of the Commission established 50 years ago in the *Hush-a-Phone* and *Carterfone* decisions and not long thereafter codified in Part 68 of the Commission's rules, and most recently reaffirmed by the Commission as to wireless networks and cable set top converters, the latter based on the principles established under Section 629 of the Telecommunications Act of 1996, the FCC's implementing rules of Section 629, 76 C.F.R. §1200 et seq., and the Court's affirmation of the FCC's implementing regulations in *Charter Communications Company v. FCC*, 460 F.3d 31 (D.C. Cir. 2006).

At the conclusion of the meeting, a request was made that the topics discussed be supplemented by writings as deemed pertinent in addition to this ex parte report. Mr. Lowinger agreed to accommodate this request.

Pursuant to Section 1.1206 of the Commission's Rules, this letter is submitted ECFS for inclusion in the public record of these proceedings, with email copies to those listed below.

Respectfully submitted,



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cc (via emails):

Hon. Robert McDowell, Commissioner

Cristina Chou Pauze, Legal Advisor, Media Issues, Commissioner McDowell